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No. 82-1190

Supreme Court of the United States

October Term, 1982

STILLWATER CONDOMINIUM ASSOCIATION,

Petitioner,

vs.

AMERICAN HOME ASSURANCE COMPANY and FIREMAN'S FUND INSURANCE COMPANY,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION

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PREFACE

By this Brief, respondents oppose the issuance of a Writ of Certiorari to review the decision of the Ninth Circuit Court of Appeals affirming the opinion of the Honorable W. D. Murray, Montana Senior United States District Judge, which granted a Summary Judgment to respondents in a Declaratory Judgment action determining the rights of parties under a comprehensive general liability insurance policy.

STATEMENT OF THE CASE

For clarification, it should be noted that Big Sky of Montana, Inc., and Chrysler Realty Corporation, the named insured in a comprehensive general liability policy, issued by respondents, were originally sued by Stillwater Condominium Association for damages resulting from structural defects in a

condominium built and sold by Big Sky to members of the Stillwater Association. That underlying action was settled in part by an assignment to Stillwater of Big Sky's interest in the comprehensive general liability policy issued by respondents. The instant litigation is a Declaratory Judgment action brought to determine coverage for those resulting damages. Both the Federal District Court in Montana and the Ninth Circuit Court of Appeals found no coverage and no duty to defend, and it is the latter Court's decision which this Court is asked to review by certiorari.

ARGUMENT

1. THE OPINION OF THE NINTH CIRCUIT COURT OF APPEALS IS NOT DEFICIENT.

On appeal below, three issues were tendered to the Circuit Court and all three were succinctly but thoroughly

decided by that Court. The first issue was whether an exception to an exclusion clause created coverage to the insured. In concluding that there was neither coverage nor a duty to defend, the Circuit Court cited all of the reported cases, both state and federal, deciding the question; and, like the opinion of the district court, followed the majority denying coverage.

On a second issue, petitioner argued that the divergence between the majority and minority opinions itself raises an ambiguity in the policy which ought to be resolved in the insured's favor; but again the Circuit Court canvassed the reported decisions and, agreeing with the majority, concluded that a "split of judicial authority" does not establish an ambiguity per se.

Third, petitioner submitted that

the loss of rental income was a property damage distinct from structural injury to the insured's product, but the Circuit Court disagreed, saying:

> "Conceptually, this is only another aspect of the defect in the product. Stillwater cites no authority and offers no argument suggesting otherwise. Thus, liability is excluded under exclusions (l) and (m)."

Finally, petitioner, as a basis to establish the insurer's duty to defend, referred to a deposition of one of the condominium owners who claimed water damage to the bottom of his dresser. Significantly, the deposition was taken before the deponent became a party by the amendment inaugurating the class action and that amendment did not include personal property injury as an element of damage. Appropriately, the Circuit Court first looked to Montana law for guidance and found in *Atcheson v. Safeco*

Insurance, 165 Mont. 239, 527 P.2d 549, 552 (1974), this direction:

> "It is to the allegations of the Alaskan complaint that we looked to determine whether or not there is a duty to defend. The appellant has a duty to defend where the complaint sets forth facts which are a part of the covered risk."

Here, of course, the complaint, even as twice amended, does not include damage to personal property of others as a claimed element of damage. Accordingly, the Circuit Court concluded:

> "Stillwater also relies upon a deposition in which there is an isolated reference to water damage to one of the condominium owner's furniture. As this damage was not alleged in either of Stillwater's complaints, the district court was not required to consider this allegation in deciding the coverage issue."

In summary, it is patently evident from the Opinion itself that the Ninth Circuit Court thoroughly considered each and every contention advanced by

petitioner, researched and recorded all of the applicable law, and correctly and finally concluded that the district court was right in granting a Summary Judgment to respondents. There simply are no defects in the Circuit Court's Opinion; but, to the contrary, the Opinion is a thorough searching analysis of all of petitioner's contentions.

2. THERE IS NO CONFLICT WITH A DECISION OF ANOTHER COURT OF APPEALS OR WITH PRIOR NINTH CIRCUIT DECISIONS.

The only other Circuit Court which has considered the principal coverage issue involved in the instant action is *Biebel Bros., Inc. v. United States Fidelity and Guaranty Co.*, 522 F.2d 1207 (8th Cir., 1975) and that decision is not contrary but, rather, is in complete accord with the Ninth Circuit's opinion. The *Biebel* decision reads in part:

> "Appellee seeks to avoid the effects of the clear language of exclusions (l) and (m) by calling our attention to exclusion (a) which provides that the insurance does not apply to: '* * * liability assumed by the *Insured* under any contract or agreement except an *incidental contract*; but this exclusion *does not apply to a warranty of fitness or quality of the Named Insured's product or a warranty that the work performed by or on behalf of the Named Insured shall be done in a workmanlike manner.*' [Final emphasis supplied.] Appellee notes the exception and argues that it would be unnecessary if the legal obligation of the insured were not based upon a breach of warranty. It fails to recognize that this language is limited to exclusion (a) and has no application whatsoever to exclusions (l) or (m) or the others here under scrutiny."

Obviously, the *Biebel* case was correctly cited by the Ninth Circuit as a leading case following the now-clear majority rule adopted by the Ninth Circuit. There is, clearly, no conflict here.

However, petitioner's counsel also points to the Ninth Circuit Court Opinion in *St. Paul Fire & Marine Insurance Co. v. Sears Roebuck and Company*, 603 F.2d 780 (9th Cir., 1979) as a contrary holding. That former decision simply found coverage for injury to property of others than the insured, but this action was initiated by the insured seeking coverage for damage to its own product, to wit: the defective condominiums it built. This, of course, is the distinguishing feature between the two cases.

Finally, the Circuit Court is accused by petitioner of failing to give "a federal construction which will resolve the conflicting interpretations." Of this accusation, suffice it to say that the decision of the Circuit Court of the Ninth Circuit is now recorded as in agreement with the ever-increasing

majority and is contrary to the shrinking minority. To this extent, at least, it adds stature to the majority and, thereby, helps to rectify the conflict upon which petitioner has so long survived.

CONCLUSION

The decision of the Ninth Circuit Court of Appeals being neither defective nor in conflict with its own decisions or those of other Circuit Courts of Appeal, the Petition for a Writ of Certiorari to review that decision should be denied.

RESPECTFULLY SUBMITTED this 14th day of February, 1983.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States and have, on the 14th day of February, 1983, within the time permitted by the Revised Rules of the Supreme Court of the United States, deposited in a United States Post Office, with first class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, forty (40) copies of the respondents' Brief in Opposition to Issuance of a Writ of Certiorari.

I further certify that I have on the same date served a copy of the Brief in Opposition to Issuance of a Writ of Certiorari upon all parties by causing three (3) copies thereof to be sent by first class United States mail, postage prepaid, to the offices of their

attorneys as listed below:

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SUBSCRIBED AND SWORN to before me, a Notary Public for the State of Montana, residing at Manhattan, Montana, this 4th day of February, 1983.

_____
Notary Public, State of Montana
Residing at Manhattan, Montana
My Commission Expires: Nov. 6, 1984